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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BERNARD ELLIS, Defendant and Appellant.	B295699 (Los Angeles County Super. Ct. No. BA463772)

Appeal from a judgment of the Superior Court, Los Angeles County, Rene F. Korn, Judge. Affirmed.

Laura R. Vavakin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Roberta L. Davis, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found Bernard Ellis guilty of willfully inflicting corporal injury resulting in a traumatic condition on the mother of his child (Pen. Code, § 273.5, subd. (a))[1] and battery (§ 242). Ellis appeals, arguing the trial court erred in excluding 17 exhibits that consisted of a video recording, text messages, and social media posts. Ellis also argues the trial court erred in admitting a statement by the victim at trial he claims was unduly prejudicial. Finally, Ellis argues the trial court violated his due process rights under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) by imposing a restitution fine and assessments without determining his ability to pay.

We conclude the trial court did not commit prejudicial error in its evidentiary rulings. We also conclude that Ellis forfeited his challenge to the court's imposition of the restitution fine and assessments and that any error in failing to determine his ability to pay was harmless. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Ellis Attacks the Mother of His Child*

On November 19, 2017, after attending a daytime party at a hotel in Beverly Hills, Ellis and Ebony C., the mother of Ellis's three-year-old daughter, Ocean, engaged in a "heated" argument inside Ellis's car. According to Ebony, as she and Ellis approached Ebony's house in Ellis's car, Ellis said to Ebony, "Bitch, if you say one more thing, Imma fuck you up," and Ebony called Ellis a "Bitch ass nigga." Enraged, Ellis hit Ebony in the face, dragged her out of the car, slammed her against the car,

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[1] Undesignated statutory references are to the Penal Code.

threw her down to the ground, and continued to hit her. Ebony tried to protect her face, but she could not block Ellis's punches. Brooklyn A., Ebony's 13-year-old daughter, was inside the house and heard her dog barking. Brooklyn went outside and saw Ellis hitting Ebony. Brooklyn saw Ebony crying and heard her call for help. Brooklyn screamed, "What the fuck are you doing to my mom?" Brooklyn ran back inside the house, grabbed a metal bat, ran back outside, and tried to hit Ellis in the back. Ellis turned and pushed Brooklyn to the ground. Ebony's mother also came outside and yelled at Ellis to stop hitting Ebony.

A witness called the 911 emergency operator and reported a man resembling Ellis was beating on a woman outside Ebony's house. When the police arrived, one of the officers observed Ebony was crying and in pain. The officers took photographs of Ebony's injuries, which included facial swelling, a bruise on the left side of her face, and a black eye. After the incident, Ebony experienced jaw pain that prevented her from eating.

Ellis, who testified at trial, had a different version of the events of that day and denied he assaulted Ebony. According to Ellis, Ebony approached him after he left the party in the hotel and followed him to his car. Ellis told Ebony to get away from him, and Ebony began to curse at him. As Ellis got into his car, Ebony held the door open, cursed at him, and tried to hit him, although Ellis was able to push her away and close the door. As Ellis pulled out of a tight parking space, he heard Ebony's shoes hitting the window of his car. Ellis denied that he and Ebony argued inside his car and that he drove her home, claiming Ebony had never been in his car. Ellis denied hitting Ebony, stating that he has "muscular" arms and that, if he were "pummeling" someone in the face, he would "do some serious damage."

B. *Ellis Seeks To Introduce Evidence Ebony Was Jealous and Vindictive*

Before trial, counsel for Ellis stated she wanted to introduce statements, photographs, and a video that Ebony either posted on Instagram[2] or sent as text messages to Ellis, members of Ellis's family, or Ellis's friends. The prosecutor objected that the exhibits, which the court marked 1 through 13, were irrelevant and "impermissible character evidence." Counsel for Ellis argued this evidence would show that Ebony was in a "vindictive, jealous rage," "literally a jealous woman scorned," and "obsessed" with Ellis and that she caused him "major, major problems." Counsel for Ellis argued that excluding this evidence "would water down . . . Ellis's defense."

The court stated, "I don't know how this isn't just throwing dirt at a victim. It's not relevant to any of the issues." Addressing counsel for Ellis, the court stated: "You indicate she's vindictive . . . . I'm not sure this [evidence] even reveals anything close to that. Does it make her look like someone who uses bad language? Does it make her look like someone who is not, what I would say, genteel? Sure. It does that. But does it go to the issues of her credibility in this case that she's making up the incident? Not one bit." The court also stated, "It's impermissible character evidence, but moreover, it's not relevant to the issues in this case. Some are a good eight months after, many of them are over two years prior to." The court excluded exhibits 1 through

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[2] "Instagram is a Web-based photograph sharing platform through which users share user-generated content. Among other things, it provides an application that allows users to upload photos, and share them with others. . . . [W]hen Instagram users create accounts, they create or are assigned usernames and passwords." (*In re K.B.* (2015) 238 Cal.App.4th 989, 998.)

13 under Evidence Code section 352, ruling the probative value of the exhibits, which included language the court would rather "not have to present in a courtroom," was substantially outweighed by the undue prejudice, confusion of the issues, and undue consumption of time their admission would cause.

The prosecutor also objected that some of the screenshots of social media posts lacked foundation because "there is no link to [Ebony] on these accounts." Counsel for Ellis acknowledged that some of the messages were posted under different user names, but stated that "it's pretty clear by the actual body of the text that [Ebony] is the sender." Counsel for Ellis initially said that Ebony, a defense witness named Lamyka Wilkerson, or Ellis could authenticate the screenshots, but later admitted that, for some of the messages, she could prove Ebony posted them only by asking Ebony when she testified.

C. *Ebony Testifies About Her Social Media Accounts*

Ebony testified she uses social media and has had only two Instagram accounts, one under the user name "birdyfly77" and the other (created after someone hacked her first account) under the user name "birdyluv_manimoochi." Counsel for Ellis attempted to impeach Ebony with printouts, marked exhibits B through E, of screenshots of four messages posted on social media under two other usernames, "4ever_birdyfly" and "birdyfly_4ever77," but Ebony denied posting any of the messages. Counsel for Ellis asked the court to admit the messages into evidence, but the court refused, explaining that exhibits "B through E are all Instagram posts that [Ebony] denied being hers. There was no other authentication made, so those will not be received into evidence."

D. *The Verdict and the Sentence*

The jury found Ellis guilty on both counts. The trial court sentenced Ellis to probation on the condition he serve 364 days in county jail. The court also imposed, among other fines and fees, a $300 restitution fine under section 1202.4, subdivision (b), a $30 court facilities assessment under Government Code section 70373, and a $40 court operations assessment under section 1465.8.[3] Ellis did not object to any of the fines, fees, or assessments.

DISCUSSION

A. *The Trial Court Did Not Prejudicially Err in Excluding Exhibits B Through E*

Ellis argues that the trial court abused its discretion in ruling he failed to authenticate exhibits B through E and that the court's rulings prejudiced him and precluded him from presenting a defense. The trial court, however, did not err in excluding some of the Instagram posts, and any error in excluding the others was harmless.

1. *Applicable Law and Standard of Review*

"Only relevant evidence is admissible. [Citation.] To be relevant, and thus admissible, a writing must be authenticated as being what it is claimed to be. [Citations.] 'When the relevance of proffered evidence depends on the existence of a disputed material fact or facts, the proponent of that evidence bears the burden of establishing all preliminary facts pertinent to the question of relevance. [Citations.] The disputed evidence is

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[3] The court also imposed and stayed a $300 probation revocation restitution fine under section 1202.44.

inadmissible unless the court finds evidence sufficient to sustain a finding that those pertinent preliminary facts exist.'" (*People v. Melendez* (2016) 2 Cal.5th 1, 23; see Evid. Code, §§ 1400, 1401.) Printouts of content posted on a social media page must be authenticated. (See *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1434-1435 [authentication provisions of the Evidence Code apply to printouts of pages from a social networking site]; *People v. Beckley* (2010) 185 Cal.App.4th 509, 514 [requiring authentication of a photograph downloaded from the defendant's home page on a social network site]; see also *People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*) ["Photographs . . . are writings as defined by the Evidence Code."]; *In re K.B.* (2015) 238 Cal.App.4th 989, 994-996 [requiring authentication of images obtained from the defendant's cell phone].)

"As with other writings, the proof that is necessary to authenticate a photograph or video recording varies with the nature of the evidence that the photograph or video recording is being offered to prove and with the degree of possibility of error. [Citation.] The first step is to determine the purpose for which the evidence is being offered. The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. [Citation.] The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.] Essentially, what is necessary is a prima facie case. 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.'" (*Goldsmith*, *supra*, 59 Cal.4th at p. 267; accord, *In re K.B.*, *supra*, 238 Cal.App.4th at p. 995.)

"Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing [citation], and there are no limits on the means by which a writing may be authenticated. [Citation.] Rather, a writing may be authenticated by its contents and circumstantial evidence, including the testimony of witnesses *other than* the person or persons who created the writing or witnessed its creation." (*People v. Cruz* (2020) 46 Cal.App.5th 715, 729; see *People v. Landry* (2016) 2 Cal.5th 52, 87; *Goldsmith, supra*, 59 Cal.4th at p. 268.)

"We review claims regarding a trial court's ruling on the admissibility of evidence for abuse of discretion. [Citations.] Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*Goldsmith*, *supra*, 59 Cal.4th at p. 266; accord, *People v. Cruz*, *supra*, 46 Cal.App.5th at p. 729.)

2. *The Trial Court Did Not Abuse Its Discretion in Excluding Exhibits B and C*

Exhibit B was a printout of a screenshot of a post by "4ever_birdyfly," dated December 11, 2017, that contained the statement: "I will destroy you in the most beautiful way possible, and when I leave, you will finally understand why storms are named after people." The post indicated the source of the quote was "scorpioquotes.com," and "#teamscorpio" appeared next to the account name. Exhibit C was a printout of a screenshot of a photograph of two children and a woman. Although the screenshot did not identify the author of the post, beneath the picture appeared a comment by "birdyfly_4ever77" that used vulgar language to insult the woman in the picture. Counsel for Ellis represented that the children in the photo were Ellis and his

sister and that the woman pictured was Ellis's mother. Ellis argues the social media posts were admissible to impeach Ebony's testimony she had only two Instagram accounts and to show her "hostility toward [Ellis] and consequently, her motive to lie."

Other than the similarity between the names of the accounts in exhibits B and C and the names of the accounts Ebony admitted were hers, there was no evidence to support a finding exhibits B and C were authentic. Exhibit B, the printout of a screenshot of a quote that appears to have been copied from a website related to a zodiac sign, does not support a finding that Ebony owned the account "4ever_birdyfly" or that Ebony posted the quote. Ellis argues the closeness in time between the post (December 11, 2017) and the day of the incident (November 19, 2017) "makes it more than obvious the quote was directed to and regarding [Ellis]." But the date of the post, three weeks after the assault, does not, without more, logically point to Ebony as the author. Although, as Ellis suggests, the zodiac sign may correspond to Ebony's date of birth, there are many people born under that zodiac sign who could have posted the quote. (See *People v. Melendez*, *supra*, 2 Cal.5th at pp. 22-24 [defendant failed to present sufficient evidence to show his codefendant wrote incriminating song lyrics found in the codefendant's jail cell because anyone could have written the lyrics, "the words were merely rap lyrics," and "[n]o reason appears to assume they relate actual events"].)

There was even less evidence Ebony authored the post in Exhibit C, the printout of a screenshot of an undated post of a photograph that appears to have been taken many years before the trial. Although counsel for Ellis represented to the court the photograph depicted Ellis as a child, no one testified to that fact. The comment at the bottom of the photograph neither mentions

Ellis nor gives any indication Ebony wrote it. (Cf. *People v. Cruz*, *supra*, 46 Cal.App.5th at p. 730 ["the prosecution made a sufficient prima facie showing that the Facebook messages to [the victim] from [fictitious senders] were . . . Facebook messages sent . . . *by* [the] *defendant*," where the content of the messages was similar to the content of other messages sent from the defendant's phone and the messages referred to matters only the defendant knew]; *In re K.B.*, *supra*, 238 Cal.App.4th at p. 998 [police officer authenticated the photographs obtained from the defendant's cell phone by testifying the photographs "were the same as those [he] observed . . . on [the defendant's] Instagram [account] earlier in the day"].)

3. *The Trial Court's Error in Excluding Exhibits D and E Was Harmless*

There was sufficient evidence to support a finding that exhibits D and E were authentic. Exhibit D was a printout of a screenshot of a post by "birdyfly_4ever77" that featured a photograph of the results of a DNA paternity test. The results indicated Ebony was the mother and Ellis was the father of a child named Ocean. (See Evid. Code, § 1421 ["[a] writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing"].)

Exhibit E was a printout of a screenshot of a "selfie" of Ebony, posted by "birdyfly_4ever77." The picture was apparently taken inside a car, and its caption read, "My 3 luv bugs." The selfie of Ebony would support a finding of authenticity. Although the prosecutor argued other people could have accessed Ebony's photos from her Instagram account, that the photo was taken of, and apparently by, Ebony established at least a prima facie case

she posted it. (See *People v. Valdez*, *supra*, 201 Cal.App.4th at p. 1435 [content on a social media page, such as an icon displaying a photograph of the defendant's face to indicate it was the defendant's page and references to the defendant's interests matching what the police knew about the defendant's interests, was sufficient to authenticate the page].)[4]

Any error in excluding these two exhibits, however, was harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, because it was not reasonably probable Ellis would have achieved a more favorable result had the trial court admitted the exhibits. (See *People v. Jones* (2013) 57 Cal.4th 899, 954, 957 [any error in excluding evidence based on the defendant's failure to lay a proper foundation "would be one of state evidentiary law only"]; *People v. Lucas* (1995) 12 Cal.4th 415, 468 [*Watson* standard applies to evidence admitted without sufficient foundation].) Ellis sought to admit the social media posts to impeach Ebony's credibility (by showing that she had more than two Instagram accounts and that she harbored hostility toward Ellis). Nothing about exhibits D and E, however, showed hostility toward Ellis. The post of the results of the paternity test

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[4] One could argue that, had the court admitted exhibits D and E, they might have authenticated exhibit C, because all three exhibits involved the username birdyfly_4ever77. (See Evid. Code, § 1410 ["Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved."].) Ellis, however, does not make that argument. In any event, any error in excluding exhibit C was harmless because, as discussed, there was no evidence the photograph in exhibit C depicted him as a child and the comment in exhibit C did not refer to Ellis. Thus, given the overwhelming evidence of Ellis's guilt, there was no reasonable probability the jury would have reached a different verdict had the court admitted exhibit C.

did not contain any negative comments about Ellis, and the post of Ebony's selfie did not refer to Ellis. And Ellis was able to show Ebony had owned more than two Instagram accounts with other evidence, including Wilkerson's testimony that she communicated with Ebony on Instagram through an account with the user name "beautifulsunshine777."

Moreover, the evidence of Ellis's guilt was overwhelming. Two eyewitnesses corroborated Ebony's account of how Ellis beat her in the street outside her house. Ebony's injuries, documented in police photographs, reflected the force and results of Ellis's attack. And the prosecutor impeached Ellis's testimony that Ebony had never been in his car with text messages Ellis sent to Ebony after the assault accusing her of damaging a mirror inside his car and telling her, "Insurance may cover the inside window, but not the outside scratches."

Finally, the trial court's error did not violate Ellis's federal constitutional rights by depriving Ellis of the ability to present a defense. (See *People v. Westerfield* (2019) 6 Cal.5th 632, 705 ["Application of 'the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'"]; *People v. Thornton* (2007) 41 Cal.4th 391, 452-453 [although the "complete exclusion of defense evidence could "'theoretically . . . rise to [the] level'" [citation] of a due process violation," short of "a total preclusion of [a] defendant's ability to present a mitigating case to the trier of fact, no due process violation occurs; even "'[i]f the trial court misstepped, '[its] ruling was an error of law merely'"""].) Ellis does not contend the court's exclusion of exhibits D and E amounted to a "total preclusion" (*Thornton*, at p. 452) of the evidence of his defense. Indeed, Ellis presented evidence to support his version of what happened between him and Ebony at the November 19, 2017 party, as well as evidence of Ebony's prolific use of social media and texting to

harass him and his friends. For example, one of Ellis's friends corroborated Ellis's account of how he and Ebony interacted at the hotel party, and another friend corroborated Ellis's testimony that Ebony followed him out of the hotel after the party. Ellis testified that Ebony was "jealous" and "very explosive" and that he had to change his telephone number "consistently" because Ebony posted his number on social media. The jury heard a voice mail message, containing graphic expletives and explicit descriptions of sexual acts, that Ebony sent Wilkerson the day of the incident in which Ebony accused Ellis of assaulting her that evening and threatened to have law enforcement look for Ellis at Wilkerson's home and workplace.[5] And there was evidence Ellis had to ask Ebony to "stop harassing [his] people." The trial court's erroneous ruling excluded only some of the evidence Ellis wanted to use to impeach Ebony. (See *People v. Jones*, *supra*, 57 Cal.4th at p. 957 [trial court's ruling the defendant failed to lay a proper foundation for certain evidence did not deprive him of the ability to present a defense "because the trial court merely excluded some evidence that could have impeached a complaining witness"].)

4. *Ellis Forfeited His Argument the Trial Court Erred in Excluding the Unmarked Exhibit*

Before trial, counsel for Ellis asked the court for permission to question Ebony about an unmarked exhibit, a printout of an undated screenshot of a message sent from "birdyfly4ever" to "heyitsbryce." Bryce was the name of Ellis's 18-year-old daughter, and the message said that Bryce now has a one-month-old sister named Ocean. The trial court stated it did not think

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[5] Wilkerson testified she was "shocked" by Ebony's accusation, but "not shocked [by] the language she used."

the exhibit was relevant at that point, but that it might be. With the court's permission, counsel for Ellis asked Ebony whether she posted the message to Bryce, and Ebony denied she did. Counsel for Ellis did not move the message into evidence, and the court did not make a final ruling on its admissibility.

Ellis forfeited any argument the trial court erred in not admitting this exhibit. "A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself. [Citations.] ""Where the court rejects evidence temporarily or withholds a decision as to its admissibility, the party desiring to introduce the evidence should renew his offer, or call the court's attention to the fact that a definite decision is desired."""" (*People v. Holloway* (2004) 33 Cal.4th 96, 133; accord, *People v. Ennis* (2010) 190 Cal.App.4th 721, 736.)

Here, Ellis did not ask the court to admit, and the trial court did not make a final ruling on the admissibility of, the unmarked exhibit. During the pretrial hearing, the court left open the possibility the exhibit "might be" relevant. Ellis had the obligation to lay a proper foundation at trial, explain how the document was relevant, and ask the court to mark the exhibit and receive it into evidence. By doing none of these things, Ellis forfeited his right to complain the court should have admitted the exhibit. (See *People v. Ennis*, *supra*, 190 Cal.App.4th at p. 736.)

B. *The Trial Court Did Not Err in Excluding Exhibits 1 Through 13, and Any Error Was Harmless*

Ellis contends the trial court erred in excluding exhibits 1 through 13 under Evidence Code section 352 because each of the exhibits showed that Ebony and Brooklyn had "hostility toward

[Ellis] . . . so extreme they were willing to do anything to destroy [Ellis's] character." Ellis further contends the error "precluded [him] from presenting a complete defense at trial." Neither argument has merit.

1. *Applicable Law and Standard of Review*

Under Evidence Code section 352, "'[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Miles* (2020) 9 Cal.5th 513, 587.) "'Prejudicial' means evidence "'that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.'"" (*People v. Johnson* (2019) 8 Cal.5th 475, 521.)

"Under Evidence Code section 352, a trial court has 'broad power to control the presentation of proposed impeachment evidence """to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues."""'" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1089-1090.) We review a trial court's ruling under Evidence Code section 352 for abuse of discretion. (*People v. Mendez* (2019) 7 Cal.5th 680, 708; *People v. Linton* (2013) 56 Cal.4th 1146, 1181.)

Ellis argues the video recording, messages, and social media posts showed Ebony and Brooklyn had "hostility" toward him, which in turn showed they "had an interest in the outcome of the case." Contrary to Ellis's assertion, however, the exhibits had little if any probative value in showing Ebony or Brooklyn had a "bias and motive to be untruthful in this matter." At best, the exhibits, some of which lacked any indication or suggestion Ebony or Brooklyn had written or sent them, showed the author

or sender used a lot of profanity and spent time disparaging people on social media. On the other hand, admission of the exhibits would have created a substantial danger of undue prejudice and confusion of the issues, and questioning witnesses about the various fragments of social media posts and text message exchanges would have consumed an undue amount of time.

Exhibit 1 was a video depicting Ebony and her oldest daughter ridiculing Ellis in a "rap-type fashion" by calling him names such as "fucked up nigga" and mocking his "super-sized, Amarosa-looking ass." In the video, Ebony also alluded to Ellis "bomb[ing]" her car. While the recording may have shown that Ebony did not like Ellis (something not much disputed at trial), it was not particularly probative on whether Ebony would falsely accuse Ellis of assaulting her. (See *People v. Jones*, *supra*, 57 Cal.4th at p. 947 [""The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive.""].) On the other hand, the crude language and use of racial slurs would have evoked an emotional bias against Ebony, and the reference to Ellis bombing Ebony's car would likely have confused the jury.

Exhibit 2 appears to be three pages of printouts of screenshots of undated comments by "oceanskylarellis" in an unidentified social media post. Exhibit 3 appears to be a printout of a screenshot of undated comments made by "brooklyn.sanai" in an unidentified social media post. And exhibit 4 appears to be printouts of screenshots of three pages of undated comments posted by "Birdyfly [C.]" Putting aside that Ellis failed to provide sufficient evidence linking any of the accounts in exhibits 2, 3, or 4 to Ebony or Brooklyn, the content of the comments was not relevant to any issues in this case. The posts consist of rambling,

incomplete sentences riddled with obscene language (such as "eat pussy" and "ass food"), derogatory epithets (such as "fraud ass nigga"), and random insults (such as "ses yo fat ass lol"). The posts do not tend to show Ebony or Brooklyn fabricated their testimony. But the vulgarity in the comments would have evoked an emotional bias against Ebony and Brooklyn.

Exhibit 5 was an email from an investigator in the Public Defender's Office, and exhibit 6 was an email from an employee of the Public Defender's Office to counsel for Ellis. Ellis has not shown how these two exhibits indicated any improper motive or bias on the part of Ebony or Brooklyn. And it is hard to see any probative value in the email exchanges involving employees of the Public Defender's Office.

Exhibits 7, 8, and 9 appear to be printouts of screenshots of text messages from telephone numbers that Ellis failed to link to Ebony. The content of the messages, that Ellis "has a felony battery assault warrant out for his arrest," that Ellis is a "deadbeat," and that someone named "Toi" had a "miscarriage" (followed by laughing emojis), has no bearing on any facts in this case. But the callous reference to a miscarriage, coarse language ("extra black ass mama"), and a photograph of what the trial court described as "a penis" would have been unduly prejudicial and confusing for the jury.

Exhibit 10 appears to be three pages of printouts of screenshots of text on social media posted by "ellis_bernard76." Ellis contends Ebony posed as him on social media. Again, Ellis did not provide any evidence to connect this post to Ebony. The content of the posts, that Ellis has "bad credit," "[o]ne bankruptcy," and "4 evictions"—matters entirely unrelated to the issues in this case—would have been unduly prejudicial and confusing to the jury.

Exhibit 11 appears to be 14 pages of printouts of screenshots of a text exchange between two unidentified people. Exhibit 12 appears to be three pages of printouts of screenshots of text and two blurry photos posted by "birdyfly_4ever77." But the content of the choppy, barely intelligible messages, which include expletives ("punk bitch") and internet slang such as "lmao" and "Lmfao," devoid of any context, does not tend to show Ebony would fabricate an incident of domestic violence.

Finally, exhibit 13 appears to be a printout of a screenshot of comments made by "beautifulsunshine777" on an unidentified social media page. Although Wilkerson's testimony suggested Ebony used the account "beautifulsunshine777," the content of the comments does not tend to show Ebony had an improper motive or bias. But the crude language used ("Ellis used ur truck to come over to my house, to[ ] fuck") would have been unduly prejudicial.

The trial court did not abuse its discretion in finding the admission of these exhibits would create a substantial danger of undue prejudice, confusing the issues, and misleading the jury that substantially outweighed any probative value the exhibits may have had. Nor did the trial court abuse its discretion in finding that presenting testimony about the context and meaning of the exhibits would consume an undue amount of time. (See *People v. Mendoza*, *supra*, 52 Cal.4th at p. 1090 [trial court did not abuse its discretion in excluding evidence that a prosecution witness had threatened to have the defendant killed because "the court could reasonably decide that the alleged threat would cause confusion or undue prejudice, given the significant difference between a jealous woman who threatens to have a rival gang 'take out' her cheating boyfriend, and one who, several weeks following a capital murder, manipulates the criminal justice system with false accusations against the boyfriend to ensure his

conviction of murder"]; see also *People v. Ghobrial* (2018) 5 Cal.5th 250, 282-283 [trial court did not abuse its discretion in excluding testimony that the victim had interacted with other adults because the evidence was "not logically related to the circumstances of his death or [the] defendant's motive for spending time with" the victim].)

Moreover, any error in excluding these exhibits was harmless. As discussed, Ellis presented evidence Ebony was jealous, had a violent temper, harassed Ellis by posting personal information about him on social media, and made disparaging comments about him to his friends. (See *People v. Harris* (2013) 57 Cal.4th 804, 847 [any error in excluding evidence the murder victim and her boyfriend had problems in their relationship was harmless "because the jury heard evidence that [the victim and her boyfriend] had fought over a variety of subjects, and had considered ending their relationship"]; *People v. Harris* (2005) 37 Cal.4th 310, 341 [error was harmless where, "[a]t most, the additional evidence the jury would have heard was of marginal value"]; *People v. Kaufman* (2017) 17 Cal.App.5th 370, 393 ["even if the court abused its discretion in excluding the proffered e-mail, we conclude any error was harmless in light of the subsequent admission of the same evidence"].) Nor, contrary to Ellis's argument, did the trial court's exclusion of exhibits 1 through 13 under Evidence Code section 352 violate Ellis's constitutional rights by precluding him from presenting a defense. (See *People v. Ghobrial*, *supra*, 5 Cal.5th at p. 283; *People v. Paniagua* (2012) 209 Cal.App.4th 499, 524.)

C. *The Trial Court Did Not Abuse Its Discretion in Admitting for a Limited Purpose an Inadvertent Statement About the Murder of Ebony's Daughter*

Ellis contends the trial court committed prejudicial error in admitting, for a limited purpose, a statement Ebony made about the murder of her oldest daughter. Because the court made the ruling at the behest of counsel for Ellis, Ellis may not challenge the decision on appeal and, in any event, any error was harmless.

1. *Relevant Proceedings*

Near the end of the trial, Ebony testified she gave the prosecutor photographs of her phone that showed text messages between her and Ellis from November 19, 2017 to November 21, 2017. On cross-examination, counsel for Ellis attempted to impeach Ebony with the text messages to show she lied when she testified earlier in the trial she did not have any contact with Ellis after he assaulted her:

"[Counsel for Ellis]: So you at that time [earlier in the trial] you said you had no communication of any kind. And then just a couple days ago, you provided these sort of blurred copies of what you purport to be text messages between you and . . . Ellis. Is that correct?

"[Ebony]: Yes, I totally forgot about the text messages. It's been over a year. My daughter was murdered in June. I've been going through a lot."

Counsel for Ellis moved to strike the testimony. The court instructed the jury: "You are to disregard the comment or statement made by the witness regarding her daughter. That will be stricken from the record." Counsel for Ellis argued outside the presence of the jury that, even though the court had instructed the jury to disregard the statement, the jury heard it. Counsel for Ellis said she "need[ed] clarification" and "need[ed] to

find out" the date of the murder. Counsel for Ellis argued she wanted to show that Ebony, before the murder of her daughter, "had x amount of months to gather information for the People." The prosecutor argued the court should not strike the statement because it "was responsive" to the question counsel for Ellis asked about why Ebony had not disclosed the text messages earlier. The court suggested giving the jury the following admonition: "[T]he court's prior striking, the court is going to admit for a limited purpose, that purpose not being any kind of sympathy for or bias[ ] against the witness on the stand, rather it's to go to the issue of why these [text messages] weren't received until Saturday or Sunday of this last week." Counsel for Ellis responded, "I also want to make it clear this literally has zero to do with . . . Ellis." The court agreed, "I can do it in that manner." Counsel for Ellis stated, "Okay."

The court gave the following instruction to the jury: "The court previously ruled that you're to disregard [Ebony's] answer regarding the murder of her daughter. I note that you are not to consider that for any kind of sympathy for or bias against [Ebony]. It is only being offered to show when in time she turned over the text messages to the People in this case. Additionally, there is no correlation at all whatsoever between the defendant and the murder of [Ebony's] daughter. They are not related. You are not to consider it for any purpose at all. I just want to be clear for you . . . the limited purpose for why that information is being brought . . . to you." After the court confirmed the jurors understood the admonition, counsel for Ellis elicited from Ebony the date of her oldest daughter's death.

2. *Ellis Invited the Error*

"'The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal.'" (*People v. Bailey* (2012) 54 Cal.4th 740, 753; see *People v. Harrison* (2005) 35 Cal.4th 208, 237 ["defendant invited any error" in the admission of a hearsay statement because "[d]efense counsel expressly acknowledged" that eliciting a portion of the statement "was a tactical decision" and knew that the admission of one portion of the hearsay statement would mean the admission of the entire statement]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139 [defendant invited any error in the admission of a prior conviction to impeach him because counsel for the defendant "expressly requested the trial court to reverse its prior ruling and rule admissible for impeachment purposes the . . . prior conviction"].) Ellis argues Ebony's statement regarding her oldest daughter's murder "should have remained stricken, and the jury's admonishment to remain." But counsel for Ellis specifically asked the court to admit the testimony so that she could ask Ebony additional questions about the timing of the murder, and even assisted in formulating the court's admonition to the jury. Rather than leave the record with the court's ruling striking Ebony's statement, counsel for Ellis persisted in her attempt to discredit Ebony's explanation for the late disclosure of the texts by seeking additional information about the date of the murder. The court acceded to counsel for Ellis's request, and Ellis cannot challenge a ruling the court made based on his attorney's tactical decision. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 ["In cases involving an action affirmatively taken by defense counsel, we have found a clearly implied tactical purpose to be

sufficient to invoke the invited error rule."]; see also *People v. Bell* (2020) 47 Cal.App.5th 153, 193 [because "'the testimony about which defendant now complains was elicited by his own counsel," any "error was invited, and defendant may not challenge that error on appeal'"].)

Citing *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, Ellis argues the invited error doctrine "does not apply to [Ebony's] testimony regarding her daughter's murder" because "[the] defense did the best out of a bad situation." *Mary M.* is distinguishable. In *Mary M.* the defendant objected to a proposed jury instruction based on a case with which the defendant disagreed; the court decided to give the instruction but gave the defendant an opportunity to draft the instruction based on the language in the case. (*Id.* at p. 212.) The Supreme Court held the invited error doctrine did not apply to the defendant's challenge to the instruction, even though the defendant had participated in drafting it. The Supreme Court stated: "'"An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."'" (*Id.* at pp. 212-213.) Unlike the defendant in *Mary M.*, Ellis did not object to the trial court's ruling to admit the statement by Ebony for a limited purpose. Instead, as discussed, the trial court asked counsel for Ellis how she wanted to proceed and agreed to her request to admit the inadvertent statement (for a limited purpose) so that counsel for Ellis could further cross-examine Ebony about her delay in producing the text messages.

3. *Any Error Was Harmless*

Finally, any error was harmless. The trial court instructed the jurors that "there [was] no correlation at all whatsoever" between the murder and Ellis and that the jurors could not "consider it for any purpose at all." We presume the jury followed that instruction. (See *People v. Flores* (2020) 9 Cal.5th 371, 405.) Moreover, given the overwhelming evidence of Ellis's guilt, there is no reasonable probability the jury would have returned a verdict more favorable to Ellis had the statement about Ebony's daughter's murder remained stricken.

D. *Ellis Has Not Shown Cumulative Error*

Ellis contends the errors were cumulatively prejudicial. "'Under the cumulative error doctrine, the reviewing court must "review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence."' [Citation.] 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial."'" (*People v. Mireles* (2018) 21 Cal.App.5th 237, 249.) With the exception of the trial court's exclusion of two social media posts (exhibits D and E), which if erroneous was harmless, Ellis has not shown error. Those two errors "are no more compelling when considered together." (*People v. Avila* (2006) 38 Cal.4th 491, 615; see *People v. Thornton*, *supra*, 41 Cal.4th at p. 453 ["[W]e have found only one assumed error . . . [and] found no prejudice from that single ruling. Accordingly, there was no error to cumulate."]; cf. *People v. Bell* (2020) 48 Cal.App.5th 1, 24 [rejecting the defendant's cumulative prejudice contention because the instructional errors the trial court may have made "were minor and not prejudicial"].)

E. *Ellis Forfeited His Challenge to the Restitution Fine and Assessments, and Any Error Was Harmless*

Ellis argues the trial court violated his due process rights under *Dueñas*, *supra*, 30 Cal.App.5th 1157 by imposing a $300 restitution fine under section 1202.4, subdivision (b), a $30 court facilities assessment under Government Code section 70373, and a $40 court operations assessment under section 1465.8 without determining his ability to pay.[6] The trial court sentenced Ellis on January 24, 2019, two weeks after we issued our opinion in *Dueñas*. Ellis could have raised the issue of his inability to pay the restitution fine and assessments, and his failure to do so forfeited the argument. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 490 ["a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court"].) Ellis does not argue otherwise.

In any event, any error was harmless because Ellis would not have been able to demonstrate he was unable to pay the restitution fine and assessments. (See *People v. Taylor* (2019) 43 Cal.App.5th 390, 401 ["*Dueñas* error [is] harmless if the record demonstrates, beyond a reasonable doubt, that the defendant cannot establish his or her inability to pay"]; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035 [same].) Ellis does not contend he is indigent, and the record does not support his inability to pay the $370 the court imposed. Ellis bought and insured a luxury

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[6] The Supreme Court has granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47 on the following issue: Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? If so, which party bears the burden of proof regarding defendant's inability to pay?

car one week before, and attended a party at a hotel in Beverly Hills the day, he committed the offenses in this case. The record demonstrates, beyond a reasonable doubt, that Ellis would not have been able to establish his inability to pay $370. (See *People v. Johnson* (2019) 35 Cal.App.5th 134, 139 [evidence the defendant owned a cell phone, held various jobs, and paid for a hotel room on the night he committed the offense was "enough . . . to conclude that the total amount [of assessments, $370,] . . . did not saddle [the defendant] with a financial burden anything like the inescapable, government-imposed debt trap [the defendant in *Dueñas*] faced"].)

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.